UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE C. TREAT, EDMUND SMITH, and LOGAN ARCHIBALD,

Appellants,

vs.

H. E. ELLIS,

Respondent.

No. 3082

Upon appeal from the District Court of the Territory of Alaska, Third Division, Hon. F. M. Brown, Judge.

APPELLANT'S BRIEF

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STATEMENT OF FACTS.

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that certain portions of the record in cause No. 2758 of this court, H. E. Ellis, appellant, vs. George Treat, Edmund Smith and Logan Archibald, appellees, may be considered a part of the record in the hearing

of this cause by this court without the same being reprinted. (Tr. p. 82.) Pursuant to said stipulation, the trial court entered an order embodying said portions of said record in said cause No. 2758 of this court in the Bill of Exceptions herein, by proper reference to such portions of said record (Tr. p. 69), and this court, by order entered herein, directed that the appellants herein be not required to print that portion of the Bill of Exceptions, herein, which consists of the transcript of record in said cause No. 2758.

When reference in this brief is made to the transcript, which refers to the portion of the transcript embodied in cause No. 2758 of this court, the same will be referred to as transcript No. 2758, and when reference is made to the transcript in this cause it will be referred to as transcript No. 3082.

The appellants commenced an action in the District Court of the Territory of Alaska on the 4th day of May, 1915. The complaint in that action alleged substantially the following facts:

That on the 15th day of May, 1907, the defendant was sole owner of eight (8) lode mining claims situated on the northerly side of Valdez Bay be-

tween Gold Creek and Shoups Bay in the Valdez Recording precinct, Territory of Alaska.

That appellee Ellis on the 9th day of July, 1908, was indebted to appellants Treat and Smith, in the sum of seven hundred sixty-one ($761.00) dollars.

That on said last mentioned date, the said appellee, Ellis, as party of the first part, and said Treat and Smith, as parties of the second part, entered into a contract, as follows:

"That the said party of the first part is the owner of eight (8) gold mining claims, situated on the north side of Valdez Bay and about ten (10) miles from Valdez, Alaska, the location certificates of which are of record in the office of the United States Commission at said Valdez, Alaska.

In consideration of the covenants hereinafter mentioned, and to be fully kept and performed by the parties of the second part, the said party of the first part agrees to deed to the Mystic Gold Mining Company, a corporation hereinafter to be formed, the said eight gold mining claims, in consideration of the issuance to him of all of the capital stock of said corporation.

That said first party will then transfer to the parties of the second part twenty (20) per cent of said capital stock, and will turn over to the treasury of the said corporation twenty (20) per cent of said stock to be sold by said treasury as may be directed

by the board of directors of said corporation, the money received from the sale of said twenty (20) per cent of said stock being the treasury stock as aforesaid or so much thereof as may be sold to be used in establishing a reduction plant upon said mining claims and the development of said claims.

That in consideration of the twenty (20) per cent issued to the parties of the second part, the said parties of the second part are to pay all expenses of incorporating said company, recording and filing all necessary papers thereon, and receipt in full all claims that said parties of the second part, or either of them, have against the party of the first part; also to give their time and attention in selling the amount of treasury stock necessary to be sold, and give whatever time and attention that may be necessary to the proper organization of said corporation and the sale of said stock."

That on the execution of said contract, appellants Treat and Smith did release appellee, Ellis, from said indebtedness; that shortly thereafter, appellants Treat and Smith caused to be prepared the necessary papers for the formation of the corporation provided for in said contract, and were ready, able and willing at all times to proceed to the complete formation of said corporation, and to pay all expenses of incorporating said company and recording and filing of all necessary papers in any manner connected therewith, to be done and per-

formed by them under the terms of said contract.

That it was understood and agreed at the time of the execution of said contract that each of the parties thereto was to be one of the incorporators and would sign and execute the articles of incorporation when it was decided to form said corporation. That after the execution of the contract of July 9, 1908, owing to the stringency of the money market and the possible difficulty that would be experienced in selling the treasury stock of said corporation to advantage, it was decided by all of the parties to said contract to await a more opportune time to form said corporation, and while so waiting, during which time appellants Treat and Smith were endeavoring to procure a purchaser for the treasury stock of said corporation when the same should be organized, said appellants Treat and Smith procured from one A. J. Crane an offer to lease the said mining claims.

That thereupon, appellee Ellis and appellants Treat and Smith mutually agreed to hold said contract of July 9, 1908, in abeyance and enter into a contract with said Crane to lease all of said mining claims to said Crane, at which time said appellee

specifically agreed verbally to and with appellants Treat and Smith that at the termination of said lease he would join Treat and Smith in forming the corporation as provided in said contract of July 9, 1908, and would carry out all of the terms of the said contract to be performed by him thereunder, or that he would deed to each of appellants Treat and Smith an undivided one-tenth (1/10) interest in and to each and all of said mining claims. That pursuant to said oral agreement, said appellee, Ellis, and appellants, Treat and Smith, entered into a contract with said Crane, giving and granting to said Crane an option to lease each and all of said mining claims for a period of six (6) years at a rent or a royalty of twenty (20) per cent of net proceeds for the said first year and twenty-five (25) per cent of net proceeds for the remaining term of said lease, and providing that eighty-five (85) per cent of said rent or royalty should be paid appellee Ellis and the remaining fifteen (15) per cent should be paid appellants Treat and Smith. That thereafter, by mesne conveyance, one B. F. Millard became assignee of said Crane in and to said contract, and thereafter on the 23rd day of July, 1909, appellee Ellis and appellants Treat and Smith, as

owners of each and all said mining claims, entered into a lease of each and all said mining claims with B. F. Millard pursuant to the terms of the said contract between said Crane and said appellee Ellis and appellants Treat and Smith. That thereafter the Cliff Mining Company, the assignee of said Millard in said lease, placed on said mining claims a large amount of mining machinery, tools, buildings and equipment of the value of more than thirty thousand ($30,000) dollars, and continued to operate said property under said lease until the 15th day of August, 1914. That the appellants Treat and Smith, as the owners of twenty (20) per cent in said mining claims and under the terms of said lease are now the owners of twenty (20) per cent interest in and to said machinery, tools, buildings and equipment.

That on or about the 3rd day of January, 1913, appellant Logan Archibald purchased from appellant Smith an undivided one-half (½) interest of said Smith's interest in and to each and all of said mining claims and in and to all of the rights and privileges accruing to said Smith by reason of the contract heretofore mentioned and set out, and said

Archibald is now and ever since on or about the 3rd day of January, 1913, has been the owner of the one-half (½) interest formerly belonging to said appellant Smith.

That appellant Treat is now the owner of an undivided one-tenth (1/10) interest; appellant Smith is owner of an undivided one twentieth (1/20) interest, and appellant Archibald is the owner of an undivided one-twentieth (1/20) interest in and to each and all of said mining claims, and in and to all of the machinery, tools, buildings, equipment and improvements thereon. That appellee Ellis, during all of the time hereinbefore mentioned, since the execution of the contract of the 9th day of July, 1908, until about the month of February, 1915, never questioned or disputed the right and title of appellants to said premises and property as therein stated, but during all of the said time recognized and approved said claim of title by appellants as therein stated.

That ever since the surrender of said property by said Cliff Mining Company to the lessors named, the appellants have been ready, able and willing to perform all of the matters and things to be per-

formed by them, pursuant to the contract of July 9, 1908, but appellee Ellis has remained without the Territory of Alaska, residing in the States of Colorado and Montana, and has refused to join the appellants in the organization of said corporation or to deed to appellants an undivided twenty (20) per cent interest in and to each and all of the said mining claims, and during or about the month of February, 1915, appellee disputed the claims of title of appellants, and denied that appellants had any right, title or interest whatever in and to said mining claims, or in and to said machinery, tools, buildings, equipment and improvements. (Tr. No. 2758, pp. 1-27.)

That the appellee's answer in said cause alleges substantially the following facts:

Admits the appellee owned all of the mining claims described in the complaint on July 9, 1908, the date of the contract between appellee and appellants Treat and Smith, to form the corporation; admits the indebtedness of appellee to appellants Treat and Smith on the date of the execution of said contract; admits the execution of the contract between appellee Ellis and appellants Treat and

Smith hereinbefore set forth; denies that appellants Treat and Smith at the time of the execution of said contract released appellee from his indebtedness to them; admits appellants Treat and Smith prepared, or caused to be prepared, the necessary papers for the formation of the corporation provided for in said contract, but denies that appellants Treat and Smith were ready, able and willing at all times to proceed to the complete formation of said contract, and to pay all expenses for incorporation and recording and filing all necessary papers in any manner connected therewith and to perform each and all of the other things to be done and performed by them under the terms of the said contract; denies that appellants Treat and Smith were at any time after the preparation of the necessary papers for the formation of said corporation, either ready, able or willing to proceed to the complete formation of the said corporation or to pay all expenses of the incorporation of said company or to perform all of the other things to be done and performed by them under the said contract, and further denies that it was ever decided by all the parties to said contract to await a more opportune time to form said corporation; denies that while so

awaiting appellants procured one A. J. Crane to offer to lease said mining claims; and denies that the parties thereto agreed mutually to hold said contract in abeyance as stated in appellants' complaint; admits that about June 5, 1909, they agreed to enter into a contract with Crane to lease all of said mining claims to said Crane, but denies that appellee agreed either verbally, or in writing, or at all, that at the termination of said lease he would join said appellants in forming the corporation as provided in said contract, and that he would carry out all of the terms of said contract to be performed by him thereunder; denies that at that time, or any other time, he agreed to deed to each of the appellants an undivided one-tenth (1/10) interest in and to said mining claims or any interest in and to any of said mining claims; admits the entering into the option contract of June 5th, with appellants and said Crane, and admits that B. F. Millard became the assignee of said Crane in and to said contract, and that thereafter appellee and appellants Treat and Smith, on the 23rd day of July, 1909, entered into a lease of all of said mining claims with B. F. Millard pursuant to the terms of the contract between appellee Ellis and appellants Treat and Smith, with

said Crane, but denies that appellants Treat and Smith entered into said contract as part owners of each and all of said mining claims, or any of said mining claims; admits the assignment of said lease by Millard to the Cliff Mining Company, but denies that said Cliff Mining Company operated said mining claim until August 15, 1914, or at any time after the day of July, 1914; alleges that appellee Ellis on or about day of July, 1914, took sole possession of said mining claims and ever since so taking possession thereof, has held said possession adversely to all persons whomsoever, and still continues to hold such possession of said claims and all of said machinery, tools, equipment and improvements placed thereon; admits that said Cliff Mining Company placed upon said claims some valuable mining machinery, tools, equipment and improvements, but denies that the value of said mining machinery, tools, equipment and improvements is of the sum of thirty thousand ($30,000) dollars, or that said value is any sum over five thousand ($5,000) dollars; denies that appellants or any of them are the owners of a twenty (20) per cent interest in and to said tools, machinery, buildings and equipment, or of any interest

therein whatsoever; denies that appellant Treat is the owner of an undivided one-tenth (1/10) interest, and denies that appellant Smith is the owner of an undivided one-twentieth (1/20) interest, and denies that appellant Archibald is the owner of an undivided one-twentieth (1/20) interest in and to each and all of the said mining claims, and in and to all of the machinery, tools, equipment, buildings and improvements thereon; denies that appellants or any of them are the owners of any interest whatsoever in and to said mining claims or in and to any of the said mining claims, or in and to any of the said machinery, tools, equipment, buildings and improvements thereon; denies that appellee during all of the time since the execution of the contract of July 9, 1908, until about the month of February, 1915, or at any other time, recognized or approved any claim of right and title or claims of appellants or any of them in and to said mining claims, or in and to any of the property situated thereon, and alleges that until shortly prior to the commencement of this action, neither of the appellants herein, or any of them, ever claim any right or title in and to said mining claims or in and to said machinery, tools, equipment, buildings and improvements, to the

knowledge of appellee, until about the month of August, 1914, at which time appellant Treat went to said mining claims and asserted a right to enter thereon, but that J. Hughes, agent of the appellee, informed said Treat of his agency, and refused to allow said Treat to enter upon said property, or to take possession of said property or any portion thereof; denies that appellee refused to join appellants in the organization of said corporation, or to deed to appellants an undivided twenty (20) per cent interest to each and all of said mining claims, and alleges that appellants never, during all of the time of his residence out of the Territory of Alaska, or at any time since June 5, 1909, demanded of the appellee to join them in the organization of the said corporation, or to deed to them an undivided twenty (20) per cent interest in the said mining claims; denies that appellee has threatened to and intended to transfer said property, and denies that said transfer, if attempted, would be in violation of the agreement and contract of the appellants, as in the complaint set forth, or of any agreement entered into or existing between appellee and appellants, and denies that he threatened to remove or sell the machinery, tools, buildings and equipment, and denies that ap-

pellants have any right, title or interest in or to said property; alleges that said contract of July 9, 1908, had been abandoned by mutual agreement between the parties thereto, and that it was agreed between the parties that the indebtedness of said appellee to said appellants Treat and Smith was thereupon revived, and that appellants Treat and Smith never, thereafter, to the knowledge of appellee, asserted any right or interest to the mining claims described in the complaint, until the month of June, 1909, at which time, one Crane and Millard were negotiating with appellee with a view of leasing or purchasing the mining claims of the appellee. That shortly prior to the 5th day of June, 1909, appellants Treat and Smith claimed an interest in the property in that their time, labor, and advances to appellee amounted to practically a grubstake, all of which appellee denies; alleges that the fifteen (15) per cent of the royalty to be paid appellants Treat and Smith under the Millard lease was in full satisfaction of all claims and demands of the appellants Treat and Smith against appellee Ellis, and of all claims and demands to any interest in and to any of the mining claims described in the complaint; alleges that appellants Treat and Smith have re-

ceived in royalties from the Cliff Mining Company more than seven thousand ($7,000) dollars; alleges that the only interest or right ever owned or held by appellants Treat and Smith in and to the said mining claims, or any of them, since the 5th day of June, 1909, was to receive, each of them, seven and one-half (7½) per cent of the total royalties paid under the terms of and during the life of said lease, which said interest or right of said appellants Treat and Smith appellee, at all times, acknowledged; that the only interest of the appellant Archibald in and to said mining claims is such interest as said Archibold may have acquired in or to the royalties payable to said Smith under the terms of and during the life of said lease. (Tr. No. 2758, pp. 33-53.)

The reply of appellants denies generally all the new matter set forth in appellee's answer. (Tr. No. 2758, pp. 60 and 61.)

That appellants herein have not set forth the entire contents of the complaint and answer in said action, but have set forth sufficient thereof to enable this court to understand all of the issues in said action. That after a trial of said cause the court rendered a decree in favor of appellants and decreed

that appellant Treat is the owner and entitled to the immediate possession of an undivided one-tenth (1/10) interest; that appellant Smith is the owner of and entitled to the immediate possession of an undivided one-twentieth (1/20) interest; that appellant Archibald is the owner of and entitled to the immediate possession of an undivided one-twentieth (1/20) interest in and to all of the lode mining claims described in the complaint in said action, together with such interests in and to all of the machinery, equipment, tools, buildings and improvements of every kind and nature now upon said mining claims or all of them, and further decreed that appellants recover of and from appellee their costs in said action (Tr. No. 2758, pp. 83, 84, 85); that thereafter, and within the time required by law, the appellee herein prosecuted an appeal to this court, whereupon, after hearing, this court reversed the judgment and decree of the trial court on the grounds that the decree awarded appellants an interest in the mining claims, whereas the action was based on an agreement to transfer personal property, and on the further ground that the contract sued on was too indefinite and uncertain to justify a decree of specific performance, as more fully ap-

pears in the opinion of this court in 236 Fed., p. 120. That thereafter, on or about the 8th day of February, 1917, the appellants herein commenced the present action, which is an action to enforce the specific performance of a contract to convey an undivided one-fifth (1/5) interest in all of the mining claims described in the former action (Tr. No. 3082, pp. 5-13); that the appellee in answer to said complaint set up among other defenses that of *res judicata* (Tr. No. 3082, pp. 27, 28); that to said answer, the appellants filed a reply putting in issue all of the new matter set forth in the answer, except the records in the former action and the identity of the parties in the two actions (Tr. No. 3082, pp. 43-48); that thereafter appellee moved the court to dismiss the action on the ground that his answer of *res judicata* was not fully denied by the reply (Tr. No. 3082, p. 49); that thereafter and on the 28th day of August, 1917, the court sustained said motion and dismissed said action on the ground that the same was barred by the former action; that the defense of *res judicata* was the only defense considered and passed upon by the court, and that the court passed upon said defense and entered judg-

ment of dismissal of this action, without hearing any evidence with reference thereto.

That the answer sets up other defenses, but said defenses are put in issue by the complaint and reply. The appellants will, therefore, confine this brief to a consideration of the defense of *res judicata,* that being the only defense involved in this appeal.

ASSIGNMENT OF ERRORS.

The court erred in making and entering its order and judgment herein on the 28th day of August, 1917, sustaining that portion of defendant's answer which set up as a defense to plaintiffs' complaint, a plea of former adjudication of the same subject matter between the same parties; and decreeing such defense to be a complete and absolute bar and defense to the matters and things alleged in plaintiffs' complaint, and that said complaint does not state facts sufficient to constitute a cause of action; and dismissing said cause on those grounds; the said order and judgment of said District Court being contrary to the law, and unsupported by the pleadings herein, or by any matters of evidence considered by the court and totally unsupported by the record of that certain cause in

the United States Circuit Court of Appeals for the Ninth Circuit, entitled, *"H. E. Ellis, Appellant, vs. George C. Treat, Edmund Smith* and *Logan Archibalt, Appellees,"* being cause No. 2758 of the said Circuit Court of Appeals, which record and the opinion of the judges of the United States Circuit Court of Appeals thereon, reported in Vol. 236, Fed. Rep., at page 120, were considered by the said District Court in entering its said order and judgment.

ARGUMENT.

Appellants contend that the judgment of the trial court dismissing this action is erroneous for the following reasons, to-wit:

1. This action is one for the specific performance of a contract to convey an interest in real estate, while the former action sought the specific performance of a contract for the sale and conveyance of personal property.

2. The complaint in the former action did not state facts sufficient to constitute a cause of action.

Referring to the first reason assigned, why the judgment of the trial court is erroneous, we submit

that there was no contract for an interest in the mining claims described in the complaint in the former action, either alleged or proved. The action was based on the contract of July, 1908 (Tr. No. 2758, pp. 1-27), which this court held to be so indefinite and uncertain as not to justify a decree of specific performance. This court in its former opinion points out briefly but clearly why the decree in the former action could not be sustained. In that opinion, the court, among other things, says:

"The assignments of error bring in question the sufficiency of the complaint to state a cause of suit and the propriety of the decree which was rendered thereon. The decree is clearly erroneous for the reason that it is unsupported by the allegations of the complaint. It does not appear from the complaint that the appellant ever promised or agreed to convey to the appellees Treat and Smith any interest in the mining claims. What the appellant agreed to do was to convey to a corporation thereafter to be formed eight (8) mining claims in consideration of all the stock of the corporation, and thereafter to transfer to the appellees, twenty (20) per cent of the stock. The decree treats the contract as a contract to convey an interest in real estate, which it is not. It is an agreement to transfer personal property. No principle of the law of specific performance is more thoroughly established than that the decree must conform to the precise contract made between the parties." *Ellis vs. Treat,* 236 Fed. 120, at 122 and 123.

The contract of July 9, 1908, which provided for the formation of a corporation, and the conveyance by the appellee of the mining claims described in the complaint to such corporation and the transfer by appellee to the treasury of such corporation twenty (20) per cent of the capital stock of such corporation, and a transfer by the appellee to appellants of twenty (20) per cent of the stock of such corporation in consideration of the appellants cancelling all of their money demands then due against appellee, is the only contract or instrument referred to in the former action which discloses any contractual relations between appellee and appellants. It may be contended by appellee that it was alleged in the former complaint that the defendant promised to carry out the terms of the contract of July 9, 1908; or that he would deed to each of the appellants Treat and Smith an undivided one-tenth (1/10) interest in and to each and all of said mining claims (Tr. No. 2758, p. 9). But it is not alleged in said complaint that at that time, or at any other time, the appellants agreed to accept said interest in said mining claims, nor did the appellants in said action attempt to prove that there was any agreement between themselves and the appellee that the latter would

convey to them any interest in the mining claims, or any of them. We wish, further, however, to call the court's attention to the fact that the portion of the complaint last mentioned was stricken from the complaint on motion of the appellants before the appellee began to put in his defense in said action. (Tr. No. 2758, pp. 215 and 216.)

One of the leading cases in this country on the question of *res judicata* is that of *Cromwell vs. Sac County,* 94 U. S. 351, 24 Lawyers' Edition, 195, which was an action on four bonds of the County of Sac in the State of Iowa, each for one thousand ($1,000) dollars, and four coupons for interest attached to them, each for one hundred ($100) dollars. The bonds were issued in 1860, and were made payable to bearer in the City of New York, in the years 1868-69-70-71, respectively, with annual interest at the rate of ten (10) per cent per annum. To defeat that action, the defendant relied upon the estoppel of a judgment rendered in favor of the County in a prior action brought by one Samuel C. Smith, upon certain earlier maturing coupons, upon the same bonds, accompanied with proof that the plaintiff, Cromwell, was at the time the owner of the coupons in that action, and that the action was

prosecuted for his sole use and benefit. The court said, among other things:

"The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest. In considering the operation of this judgment it should be borne in mind as stated by counsel that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment if rendered upon the merits constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissable matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed of which no proof was offered, such as forgery, want of consideration or payment. If such defenses were not presented in the action and established by competent evidence the subsequent allegations of their existence is of no legal consequence. The judgment is as conclusive so far as future proceedings at law are concerned as though the defenses never existed. The language therefore which is so often used that

a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy, such demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law on any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The court, further, in the same opinion, said:

"It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated; therefore, such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different

cause, because it might have been determined in the first action."

This court, in *Lim Jew vs. United States,* 196 Fed. 736, at 739, said:

"Where a suit, action or proceeding is sought to be maintained upon the same claim, a previous judgment concerning it, as an estoppel, is very broad in its effect. It concludes every fact necessary to uphold it, and extends not only to matters actually determined, but to every other matter which the parties might have litigated and have had decided as incident to and essentially connected with the subject-matter of the litigation. But the rule is otherwise where the second action or proceeding is sought to be maintained upon a different claim. There the prior judgment will only operate as an estoppel against matters actually litigated, or as to facts distinctly in issue and upon which such judgment is predicated. These principles are well established. *Cromwell vs. County of Sac,* 94 U. S. 351, 24 L. Ed. 195; *White vs. Ladd,* 41 Or. 324, 332, 68 Pac. 739, 93 Am. St. Rep. 732."

This court, in *Miller vs. Margerie,* 170 Fed., page 710, on p. 714, quoted, approvingly the following from *Cromwell vs. Sac, supra:*

"Allegations of an essential character may be omitted in the first declaration and be supplied in the second, in which event the judgment on demurrer in the first suit is not a bar to the second, for the reason that the merits of the cause as disclosed in the second declaration were not heard and

decided in the first action. *Gilman vs. Rives,* 10 Pet. 298, 9 L. Ed. 432; *Richardson vs. Barton,* 24 How. 188, 16 L. Ed. 625; *Aurora City vs. West,* 7 Wall. 225, 8 Sup. Ct. 495, 31 L. Ed. 411; *City of North Muskegon vs. Clark,* 62 Fed. 694, 10 C. C. A. 591; *Spicer vs. United States,* 5 Ct. Cl. 34; *O'Hara vs. Parker,* 27 Or. 156, 39 Pac. 1004."

And this court further said, in said opinion:

"Tested by the principles upheld in the authorities cited, which are not in conflict with *Lindsley vs. Union Silver Star Mining Co.,* 115 Fed. 46, 52 C. C. A. 640, our conclusion is that the matter put directly in issue now is not the same that was put in issue in the former suit, and that the merits of the controversy as disclosed in the last bill were not considered or decided in the first case."

The foregoing language is obviously applicable to the case at bar, for this court, in its opinion in the former case, not only did not pass upon the issues involved in this case, but specifically stated in its opinion that such issues were not involved in the pleadings in that case, and reversed the judgment of the trial court because it treated the pleadings as though the action was one for specific performance of a contract to convey land.

Balch vs. Haas, 73 Fed. 974.

Diettering vs. Nordstrom, 148 Fed. 81.

Ralston Steel Car Co. vs. National Dump Car Co., 222 Fed. 590.

23 Cyc. 1171-1172.

15 R. C. L. pp. 949-955, Sects. 429-431.

Nesbit vs. Riverside, Independent Dist., 144 U. S. 610, at 619 and 620.

Virginia-Carolina Chemical Co. vs. Kerbin, 215 U. S. 252.

In *Radford vs. Myers,* 231 U. S. 725, the court cited with approval the *Cromwell* case, and said, among other things:

"Where the suit in which the former judgment is set up is not upon the identical cause of action the estoppel operates only as to matters in issue or points controverted and actually decided in the former suit.

Judgments become estoppels because they affect matters upon which the parties have been heard, but are not conclusive upon matters not in question or immaterial."

23 Cyc. 1155-1156 and 1157.

Fayhey vs. Esterley Harvesting Co., 55 N. W. 580.

Russell vs. Place, 94 U. S. 606.

Black on Judgments, Vol. 2, Sec. 614.

We will now proceed to discuss the second reason assigned why the court erred in entering judgment of dismissal. This court in the former

action held that the complaint did not state facts sufficient to constitute a cause of suit enforceable in a court of equity, and assigned the following reasons why said complaint was fatally defective. The reasons assigned are:

1. The contract pleaded in the complaint is too indefinite and uncertain to justify a decree of specific performance.

2. The appellee never performed the covenants which were to be kept and performed by them.

3. Even if the contract were specific and certain, within well settled principles which govern specific performance equity should withhold the relief here sought on the ground that the complaint calls for the performance of acts which require the participation of others not parties to the contract or to the suit.

4. While the action is one to compel the creation and organization of a corporation, and the transfer of a portion of its stock after issuance it is so far as the appellee's interest therein is concerned a suit to compel the transfer of stock.

Can it be seriously contended that because the

appellants, misunderstanding their remedy, sought to enforce in equity an unenforceable contract, that they are now barred from maintaining a suit to enforce the specific performance of a contract which is enforceable, and which concerns real estate, while the former contract sought to be enforced concerned personal property?

A very instructive opinion on this question was rendered by this court in *Miller vs. Margerie,* 170 Fed. 710, wherein the court held that a decree dismissing a suit in equity on demurrer on the ground that the bill failed to allege essential facts is not one on the merits and cannot be pleaded in bar to a cause of action stated by an amended bill which supplies such omissions. In that case, the District Court for the First Division of the Territory of Alaska, sustained a demurrer to a complaint; the defendants elected to stand on their complaint and prosecuted an appeal to this court, where the judgment of the trial court was affirmed because the complaint did not state facts sufficient to constitute a cause of suit and the cause was remanded. Complainants thereafter filed an amended bill in the lower court, seeking to cure the omissions in the

original and to meet the views expressed by this court. Defendant filed his answer, pleading, among other defenses, *res judicata,* setting up the former judgment of the court upon the demurrer. Complainants then demurred to that part of the answer containing the plea of *res judicata.* The District Court overruled the demurrer and gave complainants ten (10) days to reply. Complainants elected to stand upon the demurrer, whereupon judgment of dismissal was entered against complainants, who thereafter prosecuted an appeal to this court. In its opinion this court said, among other things:

"Considering these averments, the bill filed in the present suit fairly supplies the principal defects in the original bill, and the lower court ought to have sustained the demurrer to the plea of *res judicata.* While a judgment upon a demurrer may be and often is a judgment on the merits, and is wholly conclusive, yet, as we have seen, the former judgment herein did not go to the real merits of the question that complainants tried to present. They failed only because their pleading did not allege all essential facts. Analogy is found between such a defective pleading and a case where there has been a judgment of nonsuit. A party may go to trial and establish some facts, but does not establish all that are necessary to make a *prima facie* case. Nonsuit is granted. A new action is begun by a complaint that is good. Defendant cannot plead the judgment of nonsuit as a bar to the second action, for the

decision on the first trial has gone no farther than to hold that the plaintiff failed to prove some one or more facts essential to his recovery. So in a judgment rendered as a consequence of sustaining a demurrer, where there has been an insufficient pleading as in the present case, complainant may supply the omissions of his bill by a good pleading, just as plaintiff was permitted to make sufficient proof where he had failed before. Freeman on judgments, Sec. 267; Black on Judgments, Sec. 707."

Neville vs. Shortridge, 79 Pac. 972.

23 Cyc. 1131.

Pepper vs. Donnelly, Kentucky Court of Appeals, 8 S. W. 441.

The complaint in the former action did not state facts sufficient to constitute a cause of suit and a demurrer to the same should have been sustained by the trial court, for the complaint was fatally defective, as has been held by this court. This court held in its opinion that the trial court misconceived the substance of the complaint in that action, for it awarded the appellants an interest in the mining claims when, as this court held, the action was one for the specific performance of a contract to convey personal property. The appellants in that action, after submitting all of their testimony and before the appellee offered any testimony, moved

the court to strike from the complaint all of the material portions of the same which in any way referred to the contract of July, 1908, and the allegation that appellee promised to deed a one-fifth (1/5) interest in the mining claims described in the complaint (Tr. No. 2758, pp. 214 and 215), which motion, against the resistance of appellee, was granted by the trial court. The allegation of the appellants' willingness, readiness and ability to perform their obligations under the contract of July 9, 1908, having been on their motion stricken from the complaint (Tr. No. 2758, pp. 12, 215, 216), a court of equity could not at their instance compel the appellee, the other party to the contract, to specifically perform his part of such contract.

"The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms."

4 Pomeroy's Equity Jurisprudence, 3rd Edition, Sec. 1407.

2 Pomeroy's Equitable Remedies, Sec. 805.

Geo. Melies Co. vs. Motion Picture Patents Co., 200 Fed., p. 342.

Cronen vs. Moore, 210 Fed., p. 239.

Rexford vs. Southern Woodland Co., 208 Fed. p. 295.

36 Cyc., p. 693.

Trans. No. 2758, pp. 215 and 216.

The parts of the complaint so stricken by the trial court are found on pages 9, 12 and 13, Tr. No. 2758.

Pepper vs. Donnelly, Kentucky Court of Appeals, 8 S. W. 441.

There was, therefore, nothing left in the complaint which stated a cause of action, much less a cause of action based on a contract between the parties enforceable in equity, and the trial court should have dismissed the action on its own motion.

We, therefore, contend that the complaint in the former action not only did not set up the same cause of action as the complaint in the case at bar, but did not state facts sufficient to constitute any cause of action, and consequently there was not and could not be any adjudication of the merits of either the cause of action attempted to be pleaded in the

former complaint or the cause of action set forth in the complaint in this action.

We respectfully submit the judgment of the trial court should be reversed.

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